

No. \_\_\_\_\_

IN THE  
**Supreme Court of the United States**

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CENTER FOR BIOLOGICAL DIVERSITY, ANIMAL LEGAL DEFENSE FUND,  
DEFENDERS OF WILDLIFE, AND SOUTHWEST ENVIRONMENTAL CENTER,  
*Petitioners,*

*v.*

THE U.S. DEPARTMENT OF HOMELAND SECURITY<sup>1</sup>,  
*Respondents.*

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**APPLICATION TO THE HON. JOHN G. ROBERTS  
FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE  
A PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA**

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Pursuant to Rule 13(5) of the Rules of this Court, Petitioners Center for Biological Diversity, Animal Legal Defense Fund, Defenders of Wildlife, and Southwest Environmental Center (collectively, “Petitioners”) move for an extension of time of 60 days, to and including February 1, 2020, within which to file a petition for a writ of certiorari.

1. The two related judgments from which review is sought are *Center for Biological Diversity, et al. v. Kevin McAleenan, Acting Secretary of the Department of Homeland Security, et al.*, Case No. 18-cv-0655-KBJ (D.D.C. Sep. 4, 2019) (“*CBD*

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<sup>1</sup> In light of Kevin McAleenan’s recent departure from the position of Acting Secretary of Homeland Security, Petitioners have removed the Secretary of Homeland Security as lead respondent and shall substitute in the newly appointed Secretary when confirmed pursuant to Federal Rule of Civil Procedure 25(d).

*v. McAleenan I*) and *Center for Biological Diversity, et al. v. Kevin McAleenan, Acting Secretary of the Department of Homeland Security, et al.*, Case No. 19-cv-2085-KBJ (D.D.C. Sep. 13, 2019) (“*CBD v. McAleenan II*”). The *CBD v. McAleenan I* judgment arises from the district court’s September 4, 2019 Memorandum Opinion denying Plaintiffs’ motion for summary judgment, 2019 U.S. Dist. LEXIS 150576 (D.D.C. 2019), Dkt. No. 37 (Sep. 4, 2019), and accompanying Orders, Dkt. No. 38 (Sep. 4, 2019) and Dkt. No. 41 (Sep. 11, 2019) (attached as Exhibit 1). Separately, in the related case, *CBD v. McAleenan II*, the judgment arises from the district court’s September 13, 2019 Order dismissing Plaintiffs’ claims for the same reasons set forth in *CBD v. McAleenan I*, Dkt. No.21 (Sep. 13, 2019) (attached as Exhibit 2). By statute, Plaintiffs’ only right to appeal is to petition for a writ of certiorari in this Court on constitutional grounds. *See* 8 U.S.C. § 1103 note, § 102(c)(2)(C).

The date within which a petition for writ of certiorari would be due, if not extended, is December 3, 2019, calculated from the date of judgment in *CBD v. McAleenan I*, pursuant to Rule 13.1 of the Rules of this Court. Petitioners are filing this Application at least ten days before that date. *See* S. Ct. R. 13.5. The jurisdiction of this Court is based on section 102(c)(2)(C) of the Illegal Immigration Reform and Immigrant Responsibility Act (“IIRIRA”), codified at 8 U.S.C. § 1103 note. Specifically, IIRIRA § 102(c)(2)(C) provides for this Court’s direct, certiorari review of the district court’s rulings:

(C) Ability to seek appellate review.—An interlocutory or final judgment, decree, or order of the district court may be reviewed only upon petition for a writ of certiorari to the Supreme Court of the United States.

**2.** This case presents substantial questions of law regarding the separation of powers which merit this Court’s attention: (1) whether IIRIRA § 102(c), which grants the Secretary of Homeland Security the unfettered discretion to waive “all applicable laws” with regard to the construction of barriers along the U.S. border, is an unconstitutional delegation of power in violation of Article I, Section I of the Constitution by transferring quintessentially legislative functions—including the authority to unilaterally choose which national public interests should be subjugated to border wall construction—to the Executive Branch; and (2) whether IIRIRA § 102(c) violates the Presentment Clause, Article I, Section 7 of the Constitution, by giving the Executive Branch unfettered discretion to, in effect, selectively repeal federal laws otherwise applicable to border wall construction without adhering to bicameralism procedures.

**3.** The related cases arise from the Trump Administration’s pursuit of a border wall along the U.S.-Mexico border.

**a.** In 1996, Congress passed IIRIRA § 102, which allowed the Attorney General to waive only two environmental laws when the Attorney General determined such waiver “was necessary to ensure expeditious construction” of a specific section of border barriers. Pub. L. No. 104-208, Div. C., Title I, § 102(c), 110 Stat. 3009, 3009-554 (1996). In 2005, Congress amended IIRIRA § 102 to massively expand the Executive Branch’s waiver authority to include “all legal requirements”—including all federal, state, local, and tribal laws—that the Secretary of Homeland Security, for any reason and without explanation, deemed

“necessary to ensure expeditious construction of the barriers and roads under this section.” REAL ID Act, Pub. L. No. 109-13, Div. B, Title I, § 102, 119 Stat. 231, 302, 306 (May 11, 2005).

b. On January 22, 2018, October 10, 2018, and October 11, 2018, the Secretary of Homeland Security published three waiver determinations in the Federal Register waiving 28 federal statutes—along with “all other federal, state, or other legal requirements deriving therefrom”—otherwise applicable to nearly 50 miles of border wall construction in New Mexico and Texas, which Petitioners challenged in *CBD v. McAleenan I*. See 83 Fed. Reg. 3,012 (Jan. 22, 2018) (Santa Teresa, NM); 83 Fed. Reg. 50,949 (Oct. 10, 2018) (Cameron County, Texas); 83 Fed. Reg. 51,472 (Oct. 11, 2018) (Hidalgo County, TX). Separately, on May 15, 2019, the Secretary of Homeland Security published three similarly worded waiver determinations in the Federal Register, waiving 43 federal laws otherwise applicable to nearly 80 miles of border wall construction in Arizona and California, which Petitioners challenged separately in *CBD v. McAleenan II*. See 84 Fed. Reg. 21,798 (May 15, 2019) (Cochise and Pima Counties, AZ); 84 Fed. Reg. 21,800 (May 15, 2019) (Imperial County, CA); 84 Fed. Reg. 21,801 (May 15, 2019) (Tecate and Calexico, CA).

With respect to *CBD v. McAleenan I*, Petitioners sued the Secretary of Homeland Security and the Department of Homeland Security in the U.S. District Court for the District of Columbia, seeking to set aside the three New Mexico and Texas waivers and require the Secretary to comply with all applicable laws in

constructing border wall.<sup>2</sup> After briefing and argument, the district court granted summary judgment for the government, rejecting Plaintiffs' claims that the expansive waiver authority exercised by the Secretary was unconstitutional. *See CBD v. McAleenan I*, 2019 U.S. Dist. LEXIS at \*7 (attached in Exhibit 1).<sup>3</sup> With respect to *CBD v. McAleenan II*, Plaintiffs Center for Biological Diversity, Animal Legal Defense Fund, and Defenders of Wildlife sued the Secretary and the Department of Homeland Security, seeking to set aside the three Arizona and California waivers and require the Secretary to comply with all applicable laws in constructing border wall. *See* Case No. 19-cv-2085-KBJ (D.D.C. Sep. 13, 2019). The district court dismissed that case for the reasons set forth in the court's Memorandum Opinion for Case No. 18-cv-0655-KBJ, with the understanding that the parties' appeal rights remain preserved (attached in Exhibit 2).

4. This Court's review is warranted in light of the important separation of powers issues at stake and IIRIRA § 102(c)'s extraordinary withdrawal of appellate review by the court of appeals. As a practical matter, in light of Congress's decision to displace the normal course of appellate review, only this Court can engage in appellate review of the important constitutional questions raised by Petitioners.

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<sup>2</sup> Plaintiffs filed two cases that were consolidated under Case No. 18-cv-0655-KBJ.

<sup>3</sup> In a separate Order, the Court made clear that it was also dismissing the claims in the consolidated case on the same basis. *See* Order Dismissing Claims in Case No. 18-cv-2396-KBJ (Sept. 11, 2019) (attached as Exhibit 1). Petitioners are seeking an extension of time to petition for this Court's review with respect to both of the consolidated cases.

Moreover, questions over the constitutionality of IIRIRA § 102(c) are likely to recur as the Trump Administration continues to issue new waivers for border wall construction. Since *CBD v. McAleenan I* commenced in March 2018, the Administration has issued an additional eleven waivers, totaling fifteen waivers to date issued by this Administration.<sup>4</sup> Further, the Administration’s exercise of authority under 10 U.S.C. § 2808—to redirect military funds from the Department of Defense for border construction pursuant to the President’s declaration of an emergency under the National Emergencies Act, 50 U.S.C. § 1601 *et seq.*—has shifted \$6.7 billion to border wall construction. The redirection of military funds and the Administration’s continued pursuit of border wall funding through Congressional appropriations ensure the issuance of future waivers and expected legal challenges. Accordingly, the important constitutional issues raised by Congress’s delegation of unfettered discretion to an Executive Branch official to waive all federal, state, local, and tribal laws, along with the ongoing practical ramifications for border residents and other interests that are supposed to be protected by those laws, warrant review by this Court.

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<sup>4</sup> See 82 Fed. Reg. 35,984 (Aug. 2, 2017) (San Diego, CA); 82 Fed. Reg. 42,829 (Sept. 12, 2017) (Calexico, CA); 83 Fed. Reg. 3,012 (Jan. 22, 2018) (Santa Teresa, NM); 83 Fed. Reg. 50,949 (Oct. 10, 2018) (Cameron County, TX); 83 Fed. Reg. 51,472 (Oct. 11, 2018) (Hidalgo County, TX); 84 Fed. Reg. 2,897 (Feb. 8, 2019) (San Diego, CA); 84 Fed. Reg. 17,184 (Apr. 24, 2019) (San Luis, AZ), 84 Fed. Reg. 17,185 (Apr. 24, 2019) (Luna and Doña Ana Counties, NM); 84 Fed. Reg. 17,187 (Apr. 24, 2019) (Yuma County, AZ); 84 Fed. Reg. 21,798 (May 15, 2019) (Cochise and Pima Counties, AZ); 84 Fed. Reg. 21,800 (May 15, 2019) (Imperial County, CA); 84 Fed. Reg. 21,801 (May 15, 2019) (Tecate and Calexico, CA); 84 Fed. Reg. 31,328 (July 1, 2019) (Starr County, TX); 84 Fed. Reg. 45,787 (Aug. 30, 2019) (Hidalgo and Starr Counties, TX); 84 Fed. Reg. 52,118 (Oct. 1, 2019) (Cameron and Hidalgo Counties, TX).

5. The extension requested is justified in light of the Court's pending consideration of the petition for rehearing of *Gundy v. U.S.*, 588 U.S. \_\_\_\_ (2019). The non-delegation doctrine issues considered in *Gundy* are highly germane to this case, and hence the Court's decision as to whether to grant rehearing in *Gundy* would have a significant bearing on how Petitioners frame their petition for certiorari here. Extending the deadline for certiorari here will therefore afford Petitioners additional time to take into consideration any pertinent developments in *Gundy*.

6. The extension requested is further justified by counsel's press of business on other pending litigation matters. Among other matters, the undersigned are responsible for briefing related to *Natural Resources Defense Council et al. v. U.S. Dep't of the Interior*, Case No. 18-cv-4596-VEC (S.D.N.Y.) (summary judgment brief due December 2, 2019); *Center for Biological Diversity, et al. v. Tennessee Valley Authority*, Case No. 3:18-cv-1446-LCB (N.D. Al.) (resolution of administrative record issues due November 8, 2019; summary judgment brief due December 13, 2019); *Environmental Defense Fund, et al. v. Elaine Chao, et al.*, Case No. 1:19-cv-2907-KBJ (D.D.C.) (response to opposition due Nov. 14, 2019; further briefing anticipated in December 2019); and *Application of Duke Energy Carolinas, LLC to Adjust Retail Rates and Charges Applicable to Electric Utility Service in North Carolina*, Docket No. E-7, Sub 1214 (N.C. Utilities Commission) (discovery and briefing from November through December 2019).

For the foregoing reasons, Petitioners hereby respectfully request that an extension of time be granted, to and including February 1, 2020, within which Petitioners may file a petition for a writ of certiorari.

Respectfully submitted,

/s/ Anchun Jean Su

Anchun Jean Su

*Counsel of Record*

Eric Glitzenstein

Center for Biological Diversity

1411 K Street N.W., Suite 1300

Washington, D.C. 20005

(202) 849-8399

jsu@biologicaldiversity.org

eglitzenstein@biologicaldiversity.org

October 21, 2019

### **CORPORATE DISCLOSURE STATEMENT**

In accordance with Rule 29.6 of the Rules of this Court, Petitioners Center for Biological Diversity, Animal Legal Defense Fund, Defenders of Wildlife, and Southwest Environmental Center, state that they are not publicly-held corporations, do not issue stock, and do not have any parent corporations.